IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION *IN LIMINE* REGARDING ANY REFERENCE TO NEWSPAPER ADVERTISEMENTS [DKT. #2432]

Plaintiff, the State of Oklahoma ("the State"), hereby submits its response in opposition to Defendants' Joint Motion *in Limine* Regarding Any Reference to Newspaper Advertisements (Dkt. #2432) ("Defendants' Motion"). Based in part on evidentiary rules precluding the use of *confidential settlement communications*, Defendants' Motion seeks to preclude the use of *public relations advertisements* that Defendants placed in Oklahoma's two most widely circulated newspapers. Defendants' Motion should be denied.

I. BACKGROUND

Nine months before the State commenced this action, Defendants embarked on a public relations campaign to persuade Oklahomans, including potential jurors, that Defendants were doing their part "to improve the management of poultry-related nutrients that might find their way into Eastern Oklahoma's Scenic River Watersheds."[1] (Oklahoman, Sept. 10, 2004, at 13A (Dkt. #2432-2).) Defendants purchased advertisements in the *Oklahoman* (*see id*.) and the *Tulsa*

[1] Although a party to this Motion, Defendant Cal-Maine did not participate in that campaign. (Defs.' Mot. at 1 n.1.) For ease of reference, however, the State refers to "Defendants" without exception.

World (Tulsa World, Dec. 5, 2004, at A29 (Dkt. #2432-3)). Among other things, Defendants acknowledged that excess nutrients on the land and in the waters of Eastern Oklahoma can come from the land application of poultry litter, and they described their efforts to manage nutrients. (*E.g.*, *id.*)

Although Defendants concede that these statements were made publicly and *after* "the failed private mediation between [Defendants] and [the State]" (Defs.' Mot. at 2), they nonetheless claim that the advertisements are inadmissible on the grounds that they were offers of compromise and/or statements made in compromise negotiations with the State (*id*. at 3-5) and are — for the same reasons — irrelevant and/or unfairly prejudicial (*id*. at 5-7). Defendants also assert that their own extrajudicial statements constitute inadmissible hearsay. (*Id*. at 7-8.) These arguments miss their mark, and the Court should reject them.

II. ARGUMENT

A. Defendants' Public Relations Campaign Does Not Implicate Rule 408

Federal Rule of Evidence 408(a) prohibits the introduction at trial of evidence of: "(1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim. . . ."

As to the first prong, Defendants' advertisements do not evidence an offer to furnish "valuable consideration in compromising or attempting to compromise the claim" for two reasons. First, Defendants cannot unilaterally bring the "proposal" publicized in the advertisements[2] within the ambit of Rule 408 simply by announcing that the "advertisements

[2] Specifically, Defendants announced that they were "working with the State of Oklahoma on a multimillion dollar voluntary proposal to improve the management of poultry-related

were placed for the sole purpose of advancing the settlement discussions between defendants and state leaders." (Defs.' Mot. at 4.) Accepting this quoted proposition as true only serves to illustrate that the advertisements were not themselves offers of compromise. Rather, they were public statements designed to influence public opinion regarding the issues in this lawsuit. However, Defendants have not — and cannot — offer any authority for the proposition that such public statements are inadmissible under Rule 408. Second, the public proposal was not "valuable consideration" because it was an expressly "*voluntary* proposal" (Oklahoman, Sept. 10, 2004, at 13A (Dkt. #2432-2) (emphasis added)). *See* Black's Law Dictionary (8th ed. 2004) (defining "voluntary" in part as "[w]ithout valuable consideration"); *see also Holmes v. Marriott Corp.*, 831 F. Supp. 691, 710-11 (S.D. Iowa 1993) (holding that unconditional offer was not offer in compromise).

As to the second prong, the public nature of the advertisements makes clear that the statements contained therein were not made in "compromise negotiations." Fed. R. Evid. 408(a)(2). As Defendants note, "[t]his Court is both cognizant and protective of the need for confidentiality of settlement situations in keeping with the limitations of Rule 408." (Defs.' Mot. at 4.) Defendants themselves cite Local Civil Rule 16.2(i) (*see* Defs.' Mot. at 4), which provides, in part, that all written and oral communications made during settlement conferences shall be treated as confidential. *See also Alexander v. Philip Morris USA, Inc.*, No. 06-CV-50, 2008 WL 2704464, at *3-*4 (N.D. Okla. July 3, 2008) (Frizzell, J.). Yet, Defendants turn this

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materials that might find their way into Eastern Oklahoma's scenic river watersheds" and provided bulleted highlights of their plan. (Dkt. #2432-2.)

rule on its head when they seek to protect, as *confidential* settlement negotiations, statements that they made in advertisements that they purchased in the two largest newspapers in Oklahoma.[3]

B. The State Is Entitled To Rely Upon Defendants' Public Statements Regarding Matters at Issue in This Case

Defendants next rely almost exclusively on the same argument — namely, that the advertisements constitute evidence of compromise or settlement under Rule 408 — in support of their contention that the advertisements are irrelevant under Rule 402 or, even if relevant, unfairly prejudicial under Rule 403. (*See* Defs.' Mot. at 5-6.) As a threshold matter, if the Court agrees with the State that the advertisements constitute neither an attempt to compromise nor conduct or statements made in compromise negotiations, then Defendants' relevance and Rule 403 arguments must also fail.

Likewise, the Court again should reject Defendants' self-serving, *post hoc* description of their intent. Although Defendants argue that their public statements were motivated by something "other than the finding of the truth" (*id*. at 5), "[t]he admissibility of statements of a party-opponent is grounded not in the presumed trustworthiness of the statements, but on a kind of estoppel or waiver theory, that a party should be entitled to rely on his opponent's statements." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 667 (10th Cir. 2006) (internal quotation marks omitted). Thus, irrespective of why they were made, the State is entitled to rely upon Defendants' *public* statements regarding the management of poultry litter,

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[3] As further evidence that the advertisements did not themselves constitute settlement negotiations, Defendants acknowledge that the advertisements were not contemporaneous with any such negotiations but rather were purchased *after* the conclusion of "the failed private mediation between [Defendants] and the [State]." (Defs.' Mot. at 2.) Whether the advertisements included statements that also were made during those negotiations is of no consequence. *See* Weinstein's Federal Evidence § 408.07 (2009) ("Rule 408 does not require the exclusion of any evidence that is otherwise discoverable merely because that evidence is revealed during negotiations.").

its land application, and its contribution of nutrients to the IRW. These statements are plainly relevant to the issues in this case.[4]

C. Defendants' Own Statements Are Not Hearsay When Offered Against Them

Finally, Defendants assert that their advertisements constitute inadmissible hearsay under Rule 802. (Defs.' Mot. at 7.) However, Rule 801 provides that a "statement" — which is defined as "an oral or written assertion," Fed. R. Evid. 801(a)(1) — is *not* hearsay if it "is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity." Fed. R. Evid. 801(d)(2)(A). There is no dispute that the advertisements are statements made by Defendants (*see, e.g.*, Defs.' Mot. at 1, 8), and those statements are being offered against Defendants by the State. Accordingly, they are not hearsay.

Defendants, however, ignore the definition of "hearsay" found in Rule 801(d)(2)(A) and, instead, claim that their statements are not "admissions"[5] because they do not concede, confess, or acknowledge liability. (*See id*. at 7-8.) This argument is unavailing. A statement by a party-opponent need not admit liability or otherwise concede or confess an issue to fall within the scope of *non*-hearsay under Rule 801(d)(2)(A). *See* 30B Charles Alan Wright, *et al*., Federal Practice & Procedure § 7015 (2009) (stating that there is no requirement that statement be against interest); *see also Grace United*, 451 F.3d at 667 (admissibility is grounded "on a kind of estoppel or waiver theory, that a party should be entitled to rely on his opponent's statements"); *Marquis Theatre Corp. v. Condado Mini Cinema*, 846 F.2d 86, 90 n.3 (1st Cir. 1988) ("statement

[4] Regarding Rule 403, any potential prejudice to Cal-Maine (*see* Defs.' Mot. at 7) can easily be cured by instructing the jury not to attribute the statements made in the advertisements to Cal-Maine. And the case law cited by Defendants regarding the prejudicial effect of evidence of settlement negotiations (*see id.* at 6) is inapposite because, as previously discussed, Defendants' advertisements do not constitute such negotiations.

[5] Rule 801(d)(2) is captioned "Admission by party-opponent."

must be against the declarant's interest . . . only when it is introduced as the hearsay exception found at Fed. R. Evid. 804(b)(3), *not as an admission excluded from the definition of hearsay* in Rule 801(d)(2)" (emphasis added)).

Finally, rehashing their relevance and Rule 403 arguments, Defendants argue that their statements are too vague and ambiguous to be probative. (*See* Defs.' Mot. at 8.) Putting aside the fact that the clarity of Defendants' statements has nothing to do with whether they are hearsay, the cases cited by Defendants are inapposite.[6]

III. CONCLUSION

For the foregoing reasons, Defendants' Joint Motion *in Limine* Regarding Any Reference to Newspaper Advertisements (Dkt. # 2432) should be denied.

Respectfully Submitted,

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[6] *See Li v. Canarozzi*, 142 F.3d 83, 85-87 (2d Cir. 1998) (affirming exclusion of unavailable non-party's deposition testimony because deponent "had indicated that some of his deposition answers as reported '*were not accurate*'" (emphasis added)); *United States v. Cleveland*, No. CRIM. A. 06-207, 1997 WL 250050, at *3 (E.D. La. May 12, 1997) (excluding comment, not because it was ambiguous, but because of "confusion *as to who actually said* [*it*]" (emphasis added)); *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1187, 1194 (10th Cir. 1997) (finding evidence of motive irrelevant *in breach of contract case*, irrespective of "motive exception" to general prohibition against evidence of prior bad acts); *United States v. Talamante*, 981 F.2d 1153, 1156 n.5 (10th Cir. 1992) (expressing concern that *evidence of prior bad acts*, "could have led to collateral mini trials" regarding those incidents).

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